Supreme Court, U. S.
FILED
MAR 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

v.

WILLIAM WATERS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Questions Presented

1. a. Does an employer violate Title VII of the Civil Rights Act of 1964 when its job superintendent fills positions by hiring from an all-white list of bricklayers from which black plaintiffs have been intentionally excluded on account of their race?

b. Was the job superintendent's claim that he did not consider applicants who sought employment by coming to the job site—the only method by which blacks had historically obtained employment with the employer—a pretext for discrimination?

2. Did plaintiffs establish that Furnco's hiring practices, including its preference for former employees from

a period when it hired only whites, perpetuated the effects of past intentional discrimination?

3. When qualified black job applicants are rejected because of an employer's hiring practice that excludes blacks from most of its jobs and that is not justified as a business necessity, can the employer defend against Title VII liability to those applicants on the ground that it has filled certain jobs with other blacks under an "affirmative action program"?

4. Did the Seventh Circuit err in declining to apply the "clearly erroneous" standard to the district court's ultimate findings on the discrimination issues when the district court misunderstood the hiring practice that plaintiffs were challenging, misconceived the controlling legal principles in plaintiffs' lawsuit, and failed to consider plaintiffs' case in a fair and impartial manner?

5. Since the issues upon which certiorari was obtained are not presented by this case, was certiorari improvidently granted?

Statement of Facts

The question before this Court is whether three fully qualified and experienced black bricklayers, plaintiffs Smith, Samuels and Nemhard,[1] were discriminatorily denied employment by petitioner Furnco when it refused

[1] Originally there were five additional plaintiffs. Two, Williams and Gilmore, were found not to have applied at the Interlake job and were denied relief. One, William Waters, was found to have been denied a job because he had been discharged by the superintendent from a job in 1962. Finally, two, Pearson and Hawkins, were hired at a later stage of the job and then fired; the trial court found that the firing was for cause. These findings were affirmed by the Seventh Circuit.

to consider them for employment and subsequently filled 85 percent of its jobs from an all-white list. In its Statement of Facts, Furnco described the type and the requirements of the work performed, its alleged program to hire a certain percentage of minorities, some general facts concerning hiring at the Interlake job and the conclusory findings of the district court. Consistent with its view that it acquired immunity from further scrutiny under Title VII by hiring a certain percentage of minorities, Furnco's brief describes neither the details of its hiring practices, historically or at the Interlake job, nor the specific circumstances concerning the refusal to hire the respondents. Notably omitted was any explanation of the origin or use of the all-white list from which most of Furnco's bricklayers were selected. Because these facts are essential to the resolution of this case, we summarize the relevant evidence.

Furnco contracts with companies to do construction work, primarily the relining of blast furnaces. These jobs may last from several months to over a year. Furnco does not maintain a permanent work force of bricklayers. Rather, the company hires a superintendent for a specific job who is responsible for hiring the employees. Mr. Wright, the vice-president and general manager of Furnco, agreed that "each superintendent is free to fill the job as he sees fit."[2] This procedure depends on the practices of individual supervisors and results, according to Wright, in bricklayers being selected in many different ways. The superintendent may hire bricklayers whom he knows, may request referrals from supervisors or from bricklayers, or may recruit and screen possible employees in any other way he chooses. (Tr. 671).

[2] Tr. 686; see Brief of Petitioner p. 6.

All of the superintendents selected by Furnco to oversee bricklaying jobs in the Chicago geographical area have been white. (Tr. 693). The record indicates that prior to 1969 Furnco had never hired a black bricklayer.[3] In 1969 one or more superintendents employed by Furnco began to hire black bricklayers by accepting applications made by black bricklayers at the site of a Furnco job at the South Works plant of United States Steel Corporation.[4] Respondent Smith was hired subsequently at another Furnco job in 1971 after he had applied at the entrance gate. (Tr. 315). Prior to the Interlake job involved in this case, every black bricklayer hired by Furnco obtained employment by applying at the job site. Furnco's supervisors recommended that black bricklayers in search of work apply in this manner for work on the Interlake job. (Tr. 237, 327).

Prior to the Interlake job in 1971 Furnco had operated what was, in effect, a dual hiring system. Black bricklayers were hired by Furnco only after they applied for work at the job site.[5] White bricklayers were hired by being personally contacted by the job superintendent or by being referred by foremen or other Furnco bricklayers.[6] The critical obstacle to minority employment was the fact that Furnco never advertised, posted notices of, or otherwise made generally known the existence of vacancies at a given site. Black bricklayers had to learn of these secret vacancies through rumor and surmise, while white bricklayers were individually recruited and told of the job opportunities. For the Interlake job this dual hiring practice was affected by two factors: pending litigation and the particular superintendent, Joe Dacies, hired by Furnco.

Dacies had worked in the firebrick industry since 1939. (Tr. 767). Dacies was first employed by Furnco in 1964 as a bricklayer and in 1965 as a superintendent. Dacies hired 85 percent of the bricklayers for the Interlake job by referring to a list which he maintains. (Tr. 769):[7]

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[3] Waters, a plaintiff, testified that, he had personally heard Furnco superintendents Urbanski and Larkin testify before the Illinois Fair Employment Practices Commission that Furnco to their knowledge had not hired a black before 1969. Tr. 513-14. This was admissible as an admission by a party opponent. Rule 801(d)(2), Federal Rules of Evidence; cf. *United States* v. *Matlock*, 415 U.S. 164, 172, n. 8 (1974). The black plaintiffs who had been working in the firebrick industry in the Chicago area for many years had not been employed by Furnco before 1969. Furnco offered no proof that it had hired blacks prior to 1969 or that Waters had not accurately described the testimony of Urbanski and Larkin. Furnco's failure to do so is hardly surprising in view of the fact that the company was represented at the F.E.P.C. hearing by the same counsel who represented it in this case. At that hearing Larkin, for example, testified, "I have worked for Furnco since almost they have been Furnco. . . . To tell the truth, I don't recall any colored bricklayers on any other jobs [prior to that in 1969]." Transcript of Hearing of August 10, 1970, pp. 203-05.

[4] Four black bricklayers gave uncontroverted testimony that they applied for jobs at the gate at the South Works job and were hired by Furnco: Samuels, Tr. 234-36; Smith, Tr. 314-15; Waters, Tr. 509; Pearson, Tr. 562.

[5] The black workers who had previously worked for Furnco had never prior to the Interlake job been called by a Furnco superintendent and requested to report for work without having first presented themselves at the particular job site and requested work.

[6] Furnco in its statement of facts states that it was not the "practice" of Furnco or the industry to accept applications. The district court so found, A14-15. As to Furnco this is true only for white employees.

The Court's findings and Furnco's statement as to the industry are inconsistent with their opposition at trial to the consideration of evidence as to the industry practice. Counsel for Furnco argued strenuously in objecting to the plaintiffs' attempt to introduce evidence as to industry practice that the evidence was irrelevant. Tr. 59, 241-44. The Court at one point simply stated, "I'm not interested in what the practice is in the industry." Tr. 561. See *infra* at n.34. The Court rejected plaintiffs' proffered evidence on the ground that the issue was irrelevant, but subsequently resolved the issue in defendant's favor.

[7] Dacies routinely filled the job with employees on his list. Tr. 769-70. In fact, 36 of the 37 whites who were hired by Furnco

> Well, I have a list of bricklayers. There are various notes, I don't have a direct file system, but it is people, prior to even working with Furnco, I had worked with bricklayers all over the country, and in this area. I have kept their telephone numbers, because they were good mechanics. So when I have a job, I try to contact them.

Dacies' list did not contain a single black bricklayer,[8] even though Dacies had worked with black bricklayers since 1958, had supervised five to eight black bricklayers in 1962 for another contractor (Tr. 873), and had supervised jobs for Furnco in 1969 and in 1971 on which blacks were employed. (Tr. 777; 873-75).[9] Respondent Smith had worked for Dacies on four separate occasions (Tr. 343-45) and respondent Samuels on one occasion.[10] Neither Dacies

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between August 26 and the end of September were called by Dacies from his list; the 37th was recommended by one of the white bricklayers whom Dacies had hired from the list. Tr. 780-86; Joint Exhibit 1.

[8] Dacies testified.

> "Q. Now, did you know the names of any black bricklayers?
> A. I knew a couple that was at South Works, but I didn't have their addresses or telephone numbers. . . ."

Tr. 778.

[9] The record is vague as to how many jobs and how many black bricklayers Dacies supervised, because the district court ruled that "It does not make any difference how many jobs he supervised" and sustained an objection by Furnco's counsel to questions concerning Dacies' work history. Tr. 874-75.

[10] Although Samuels did not recall working with Dacies, it is clear from Dacies' testimony that they worked together on the U.S. Steel South Works job in 1969. Dacies worked as a supervisor on the job (Tr. 806, 874-75), while Samuels was the third black hired and worked at least five months as a bricklayer on the job. Tr. 234, 249. Although Samuels was hired (Tr. 235-36) and directed (Tr. 266) by another supervisor, Dacies had an opportunity on this job to become familiar with Samuels' work.

nor Furnco offered any explanation why Smith, Samuels or other qualified and experienced black bricklayers known to Dacis were excluded from the list.

Dacies' customary hiring practice was modified on the Interlake job by Furnco's response to prior charges of discrimination and to the pendency of a related Title VII case.[11] Wright, a company general manager, testified that he called Dacies prior to the commencement of the job and said that Furnco wanted him to hire "a minimum of 16 per cent black bricklayers on the job if at all possible". (Tr. 675). Work began on the Interlake job on August 26, 1971, and continued through November. Between August 26 and September 30, Dacies employed 41 bricklayers, of whom 37 were white. (Joint Exhibit 1). Thirty-six of the 37 whites were hired by Dacies from his all white list;[12] the 4 blacks were employed after Dacies contacted another Furnco superintendent, Mr. Urbanski.[13] Two of the blacks

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The district court erroneously prevented plaintiffs' counsel from inquiring as to the extent of this opportunity. Tr. 875:

> "Q. [By plaintiffs' counsel] Could you [Dacies] tell me who these black bricklayers were [with whom he recalled working on the South Works job]?
>
> THE COURT: The objection is sustained [there was no objection]. It doesn't make any difference who they were. The thing involved here is Furnco's policy about hiring bricklayers and not what some other policy was on some other years before."

Plaintiffs' counsel argued that the question was proper and relevant. But the district court ruled, "You may think it [the question] is [relevant], but I am not concerned about review of *my* objections either". (emphasis added) Tr. 876.

[11] *Batiste* v. *Furnco Corporation*, 350 F.Supp. 10 (N.D. Ill. 1972), *rev'd* 503 F.2d 447 (7th Cir. 1973), *cert. denied* 420 U.S. 928 (1975).

[12] See *supra* at n.8.

[13] One of the four blacks was actually hired upon the recommendation of his brother whom Urbanski had referred to Dacies. Tr. 781.

employed in this period were not in fact *hired* at all, but were merely transferred from another Furnco job to the one at Interlake.[14]

The focus of this case is on the hiring by Furnco in August and September. Settlement negotiations in a related Title VII case between Furnco and several black bricklayers, including the plaintiffs in this case, began in the summer but broke down towards the end of September. After the termination of the settlement talks and after several of the plaintiffs in this action had filed charges with the E.E.O.C.,[15] Wright telephoned Dacies and instructed him to consider hiring several black bricklayers involved in those negotiations. (Tr. 678, 778-79). Between October 12 and 18 Dacies hired six workers, all black bricklayers who were among those mentioned by Wright to Dacies, whom Wright and Dacies knew were threatening legal action against Furnco, and who were the "focus of the settlement negotiations." (Tr. 677).[16] Thereafter Dacies

[14] One black, R.D. Jones, testified that Larkin, a Furnco foreman approached him on the Bethlehem job and told him to report for work at Interlake. Tr. 913-14. Plaintiffs offered into evidence, as their exhibit 10, a list of employees on the Bethlehem job which Furnco was operating contemporaneously with the Interlake job. This list was supplied as part of Furnco's Answers to Interrogatories. Tr. 381. It indicates that Joseph Alston, a black bricklayer, was employed on the Bethlehem job until September 7, 1971; the following week he was employed on the Interlake job, Joint Exhibit 1. Clearly, Alston like Jones was transferred to the Interlake job. The district court erroneously denied the plaintiffs' offer of the exhibit because "It does not prove a thing." Tr. 383. However, counsel for Furnco subsequently asked R.D. Jones a question concerning the list, Tr. 920, and the district court stated to Furnco's counsel "I don't care whose exhibit it is. As he [plaintiffs' counsel] said, you made it up and you have got it here". Tr. 922.

[15] See Pre-trial Order, p. 5; Tr. 139, 201, 494, 608.

[16] The six men hired were William Smith and Willie Pearson (plaintiffs in this case), Sylvester Williams and Vandy Hawkins (plaintiffs in both this case and the *Batiste* case), and Charles

resumed hiring from his usual list, employing seven additional workers, all white, until the completion of the job.

The Three Plaintiffs

The three plaintiffs for purposes of this appeal are William Smith, Donald Samuels and Robert Nemhard. All three are competent bricklayers who had between 18 and 30 years experience in their craft at the time of the trial,[17] and had firebrick experience.[18] All three sought employment on the Interlake job by going to the job and attempting to leave their telephone numbers with the superintendent.[19]

William Smith has worked continuously as a bricklayer since 1944 (Tr. 311), and first worked on a firebrick job in 1950 (Tr. 311). Furnco stipulated at trial that Smith was both experienced and qualified. (Tr. 313-14). Smith first worked on jobs with Dacies in 1958 and again in 1962. (Tr. 343-5). In 1969, Smith first secured employment on a Furnco job at the U.S. Steel South Works plant by going to the job site, where he was hired by a Furnco foreman. (Tr. 314-15). Dacies was Furnco's assistant superintendent on that job. After the South Works job, Smith applied for employment on a Furnco job at the Bethlehem Steel Mill in Indiana by going to the gate and leaving his name and telephone number. While he was not hired on that particular job, he reapplied in 1971 for another Furnco job at the Bethlehem Mill by going to the Mill on a number of occasions and was ultimately hired by Furnco's bricklayer

Temple and Raymond Pendarvis (plaintiffs in the *Batiste* case only). All six were among the alleged victims of discrimination being discussed in the *Batiste* negotiations.

[17] Tr. 66, 227, 310.

[18] Tr. 66, 229-35, 310-15.

[19] Tr. 74-8, 327-30, 519-24.

superintendent on that job, Albert Urbanski. Dacies was also employed on this job as the Assistant Superintendent and thus the two men worked together for the fourth time. (Tr. 315, 326-7). At the time he was laid off the Bethlehem job, Smith was told by Urbanski that there would be a Furnco job at Interlake and according to Smith, Urbanski said, "I don't know who is going to run the job but . . . if you go there you might get on." (Tr. 327). As suggested by Urbanski, and consistent with the way he had secured every other job he had ever worked in the firebrick industry—including all Furnco jobs—Smith began going to the Interlake job site to seek employment. Smith testified that he went to the site on numerous occasions and had seven or eight conversations with Dacies between the time Dacies first appeared in August and the date Smith was eventually hired, October 12, 1971. (Tr. 327-30). Dacies could specifically recall only one conversation with Smith and Dacies testified that he had said "You can go—you might as well go home, Smitty. I will call you when the job is ready, when I am ready to hire people." (Tr. 871). However, Smith was not called when Dacies was hiring in August and September, 1971, and was not hired until October 12, 1971.

Donald Samuels has been a bricklayer since approximately 1957. (Tr. 227). Beginning around 1957 Samuels worked for six or eight different firebrick contractors prior to the Interlake job. (Tr. 229-34). Samuels first worked for Furnco, Dacies and Urbanski on the U.S. Steel South Works job in 1969, after having gone to the job site and applied to Larkin, a bricklayer foreman. (Tr. 235-7). He worked for Furnco on the South Works job for approximately five months. Samuels next sought employment with Furnco at the Interlake job in August, 1971. According to Samuels, he went to the job site on three or four occasions. (Tr.

249-59). On one occasion he and another of the plaintiffs stopped Dacies' car as Dacis was leaving the job site, told him they were bricklayers looking for work and slipped a piece of paper with their names and telephone numbers, as well as the names and phone number of two other black bricklayers, into the side vent window of the car. However, Dacies merely "balled it up and threw it . . . on the ground." (Tr. 521-2; Plfs. Ex. 7). Samuels also recalled a second conversation with Furnco's general superintendent in which the superintendent was asked to tell Dacies that there were bricklayers at the gate looking for work. The superintendent returned to tell them that Dacies was not hiring. (Tr. 258-9, 524). Samuels was never hired on the Interlake job.

Robert Nemhard has worked as a bricklayer since 1945 and, before Interlake, had worked two firebrick jobs. (Tr. 66, 68, 72). Nemhard began going to the Interlake job in August and continued to visit the site through mid-September. (Tr. 74-6). Nemhard testified that on a number of occasions he sought to speak to Dacies, but that Dacies had avoided him. (Tr. 74). On one occasion, while trying to speak to Dacies, he was almost run over by Dacies' car. As a result of that incident, Nemhard wrote a letter to Furnco expressing his outrage at its superintendent's conduct and asking the company for a job. (Tr. 76-79). Nemhard never succeeded in talking with Dacies. Like Samuels, Nemhard was never employed on the Interlake job.[20]

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[20] Dacies testified that he did not know that there were any black bricklayers seeking work at the gate. (Tr. 868). The trial court made no finding as to this matter and Dacies' testimony is difficult to reconcile with the facts that: (a) Dacies recalled at least one conversation with Smith at the job; (b) Dacies recalled that his car was stopped by Samuels and that he was slipped a piece of paper; (c) Dacies acknowledged that on a couple of occasions a guard called him to tell him that there were bricklayers looking for work (Tr. 869-70); and (d) Smith testified to a subsequent

Respondents sued Furnco because they were not hired when they sought to apply in August, 1971, although 44[21] white bricklayers who had never sought jobs, and whose qualifications were not better than those of respondents, were hired after respondents were rejected.[22]

Summary of the Argument

Furnco's argument fails to address the specific details of its hiring practices—particularly the use of Dacies' all-white list—which led to the refusal to hire plaintiffs.

I. Plaintiffs unquestionably proved that they were black, were qualified bricklayers, had sought work at Furnco, and had been rejected, and that Furnco subsequently recruited and hired at least 37 white bricklayers. This evidence was sufficient to establish a *prima facie* case under *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and shifted the burden to Furnco to prove a legitimate, nondiscriminatory business reason why plaintiffs were rejected. Furnco failed to carry that burden.

Furnco attempted to justify the rejection of plaintiffs by asserting that their supervisor, Dacies, followed a policy of not accepting applications at the job site and of hiring instead off a list of bricklayers known to him personally. This was inadequate to explain why plaintiffs Smith and

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conversation with Dacies in which Dacies said that he was not hired earlier because he was with "those other fellows" (Tr. 334), a conversation Dacies never denied.

[21] Of the 44 whites hired by Dacies, 42 were hired in September and October. Respondents had sought work at the Interlake site in August.

[22] Samuels and Nemhard were never employed at the Interlake job. Between Smith's initial rejection and Dacies' decision to hire him in October, 37 white bricklayers were hired.

Samuels were not hired, since both Smith and Samuels were known to Dacies and had worked with him on Furnco jobs in the past. Furnco gave no explanation why Dacies had neither put Smith or Samuels (or any other black bricklayer) on his list nor called them when he knew they were looking for work. More broadly, the evidence overwhelmingly showed that Dacies' refusal to accept application at the job site was a pretext for discrimination.

Furnco also attempted to rebut plaintiffs *prima facie* case by showing that Dacies had, at the insistence of a higher company official, hired a percentage of blacks alleged to be comparable to the minority percentage of the area work force. This action was irrelevant to Dacies' motivation, since it occurred at the direction of a different Furnco employee. "Affirmative action" which benefits one group of blacks cannot constitute a defense to claims of other blacks who were the victims of intentional discrimination.

II. Dacies' practices limited hiring to persons known to him or referred by another Furnco employee. These practices perpetuated the effect of past discrimination by Furnco and Dacies in two ways.

First, special treatment for persons referred by Furnco employees necessarily perpetuated any past discrimination in the selection of Furnco employees. *Asbestos Workers Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969). By intentionally discriminating against Smith, Dacies foreclosed the one remaining avenue to employment for blacks not known to Dacies or Furnco but only known to Smith. Respondent Nemhard was injured in this manner since he was an acquaintance of Smith and had applied to Furnco with Smith.

Second, the record demonstrated that Dacies and Furnco had a history of racial discrimination prior to the Inter-

lake job. Furnco had not hired any blacks prior to 1969, and thereafter operated separate hiring systems for blacks and whites. Dacies had never hired a black prior to the Interlake job. These discriminatory practices prevented plaintiff Nemhard from acquiring experience with Dacies or Furnco, and Dacies' prior experience requirement operated "to freeze the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971).

III. This case presents a variety of important legal issues as to the meaning of disparate impact and business necessity under *Griggs*. The court of appeals, however, never considered these issues, since it concluded that plaintiffs had established intentional discrimination under *McDonnell Douglas*. Although the district court rejected plaintiffs' *Griggs* argument in a conclusory manner, its opinion contains no consideration of the legal theories pressed by petitioner and respondents. Accordingly, respondents urge that this Court not address these issues, but remand them instead to provide the court of appeals with an opportunity to do so.

Should this Court not do so, respondents offer three bases for finding a disparate impact under *Griggs*. First, Dacies' practice of filling the bulk of the jobs with an all-white list violated *Griggs* because it excluded blacks from all jobs filled off that list. Second, only blacks sought to apply for work at the gate, so only blacks were adversely affected by Dacies refusal to consider such applications. Third, during the relevant time frame, Furnco's practices resulted in the hiring of a minority work force of only 5 percent, compared with a relevant labor market that was actually at least 13.7 percent black. Furnco failed to establish that the disputed practices were required by business necessity.

IV. The Seventh Circuit properly declined to apply the "clearly erroneous" standard to the findings of the district court. The findings themselves are conclusory and fail to address most of the contested factual issues. The findings provide no indication as to the District Judge's view of the legal significance of the evidence adduced by plaintiffs. The District Judge totally misconceived the controlling legal principles of Title VII and erroneously excluded much of the evidence afforded by plaintiffs. Having rejected some of this evidence on the ground that it related to irrelevant issues, the judge then ruled for the defendants on those issues and relied on those findings in rendering decision for defendants. The findings of the District Judge were apparently written by counsel for defendant after the case was decided, and thus provided no guide as to the reasoning that led the judge to rule in favor of defendants. Finally, the trial of this action was punctuated by intemperate and unwarranted remarks by the District Judge directed at the court of appeals, Title VII, plaintiffs and plaintiffs' counsel.

V. The "Questions Presented" asserted in the Petition for Writ of Certiorari are not in fact presented by this case at all. The court of appeals did not hold that evidence of substantial minority employment is "irrelevant," or that "discriminatory effect" can be found in the absence of "disparate impact." Petitioner's brief does not focus on these issues, but deals largely with arguments not fairly comprised within the questions presented. Under these circumstances, certiorari was improvidently granted.

ARGUMENT

I.

Plaintiffs Proved Intentional Racial Discrimination Under *McDonnell Douglas Corp.* v. *Green.*

A. Plaintiffs' *Prima Facie* Case

In *McDonnell Douglas Corp.* v. *Green,*[23] 411 U.S. 792, 800 (1973), this Court considered "the order and allocation of proof in a private, non-class action". The plaintiff meets his burden by showing that he is qualified, a member of a racial minority group, and "had unsuccessfully sought a job for which there was a vacancy and for which the employer continued thereafter to seek applicants with similar qualification", *Teamsters* v. *United States,* 431 U.S. 324, 358 (1977). There is no question that the plaintiffs in the instant case belong to a racial minority, that "they did what they could to apply",[24] that they were qualified, that they were rejected and that Furnco thereafter hired more than 37 white bricklayers who, unlike plaintiffs, had not even sought employment at Interlake, and whose qualifications were not demonstrably better than plaintiffs'.

That was all plaintiffs were required to show to establish a *prima facie* case under *McDonnell Douglas* and *Teamsters.*[25] In addition, plaintiffs demonstrated that

[23] The court of appeals carefully followed the *McDonnell Douglas* standards in analyzing the evidence. A6, A9. The district court did not consider those standards at all.

[24] Both the district court (A17) and the court of appeals (A6) found that the respondents sought employment. The white bricklayers, on the other hand, never had to seek work at Furnco or express any interest in being hired.

[25] Furnco does not deny that plaintiffs proved the four elements of a *prima facie* case identified in *McDonnell Douglas,* but apparently urges that plaintiffs were also required to prove a fifth element, "discriminatory motive or intent". Brief of Petitioner, pp. 45-50. Evidence establishing those four elements *is* a *prima facie* case of such motive or intent. *Teamsters* v. *United States,* 431 U.S. at 335, n.15, 358, n.44.

Furnco had established no objective standard to be applied in selecting bricklayers, but had left Dacies "free to fill the job as he [saw] fit". (Tr. 686). The standardless discretion thus afforded to Dacies by Furnco was the type of system which this Court has repeatedly warned "is susceptible of abuse" and thus buttresses plaintiffs' *prima facie* case. See *Casteneda* v. *Partida,* 51 L.Ed. 2d 498, 512 (1977).[26]

B. Furnco Failed To Rebut Plaintiffs' *Prima Facie* Case

Once plaintiffs established this *prima facie* case, the burden[27] shifted to Furnco to rebut it by establishing "some legitimate, nondiscriminatory reason" for the refusal to hire, *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802. Furnco's burden was to present sufficient proof to demonstrate that discriminatory "intent was not among the factors that motivated" the failure to hire the plaintiffs, *Keyes* v. *School District No. 1,* 413 U.S. 189, 210 (1973); cf. *Arlington Heights* v. *Metropolitan Development Corp.,* 429 U.S. 252, 266 (1977).

[26] Six Circuits have held that employment decisions which depend upon the subjective evaluation of an immediate forum and which are not reviewed are "a ready mechanism for discrimination". *Rowe* v. *General Motors Corp.,* 457 F.2d 348, 359 (5th Cir. 1972); *Kinsey* v. *First Regional Securities Inc.,* 557 F.2d 830, 838 (D.C. Cir. 1977); *Brown* v. *Gaston County Dyeing Machine Company,* 457 F.2d 1377, 1383 (4th Cir. 1972), *cert. denied,* 409 U.S. 862 (1972); *Senter* v. *General Motors,* 532 F.2d 511, 528 (6th Cir. 1976) *cert. denied* 429 U.S. 870 (1976); *Stewart* v. *General Motors Corp.,* 542 F.2d 445, 450-51 (7th Cir. 1976), *cert. denied,* 54 L.Ed.2d 1105 (1977); *Muller* v. *United States Steel Corp.,* 509 F.2d 923 (10th Cir.), *cert. denied* 423 U.S. 825 (1975).

[27] Both the burden of proof and the burden of going forward with the evidence shifted to Furnco. It was the former which it did not meet.

Although Furnco argues at length, and on this record without foundation,[28] that laying firebricks is an extremely difficult and specialized job, Furnco does not contend that it rejected respondents because it believed them unqualified. Furnco stipulated that Smith was fully qualified. Tr. 313-14. Samuels had extensive firebrick experience, and had done such work for Furnco itself.[29] Nemhard too had firebrick experience, and Furnco concedes that in his as in the other cases the "rejection for employment was not the product of any determination as to their individual qualifications".[30]

Furnco sought to rebut plaintiffs' *prima facie* case in two ways. First, Furnco attempted to prove that plaintiffs were rejected because Dacies had a practice of only hiring bricklayers known to him and of refusing to accept or consider applications. Second, Furnco urges that the proportion of blacks on the Interlake job was comparable to that in the area work force, and contends that such evidence is conclusive proof that it did not engage in racial discrimination.

1. *Dacies Hiring Practices*

a. *Smith and Samuels:* Furnco's general rebuttal is that the Company does not "hire at the gate", that Dacies

[28] The president of the local bricklayers union testified that any experienced bricklayer could do firebrick work if he were willing to work hard. Tr. 829. Consequently, the union provides no training or apprenticeship in firebrick work, and bricklayers who do this work acquire the necessary skill through on the job training. Tr. 58-59. Although a witness recalled a single instance in which a blast furnace exploded, no testimony was offered that this was in any way connected to the brickwork involved. Tr. 660.

[29] "[T]he employer's acceptance of his work without express reservation is sufficient to show that the plaintiff was performing satisfactorily. . . ." *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977).

[30] Brief of Petitioners, p. 16.

only hired bricklayers known to him or who were referred by an insider, a foreman or another bricklayer. Whether this is true and, if true, whether motivated by racial considerations, are in dispute. But the dispute does not need to be resolved as to Smith and Samuels. Smith had worked with Dacies on four separate occasions; Samuels had worked for five months on a job at the South Works of U.S. Steel Corporation where Dacies was a supervisor. Both were qualified bricklayers who had performed satisfactorily on Furnco jobs under the supervision of Dacies. Furnco offered no justification of Dacies' refusal to recruit Smith and Samuels for the job as he recruited forty-two white bricklayers with whom he had also previously worked.[31]

The record reveals that Smith and Samuels were not offered jobs merely because they, as all the other blacks with whom Dacies had ever worked, were omitted from his list. Dacies sought to justify this omission by asserting that he did not have the telephone number of any black bricklayers. (Tr. 778.) But he did not explain why he had only recorded the telephone numbers of white bricklayers[32] or why he did not obtain the telephone numbers

[31] The failure of Furnco to present evidence explaining why Dacies did not recruit any of the black bricklayers who had formerly worked with him supports the inference that Dacies was motivated by racial considerations. This evidentiary principle is well-established. The Court of Queen's Bench articulated the rule over two hundred and seventy years ago:

> [B]ut if very slender evidence be given against him, then, if he will not produce his books, it brings a great slur upon his cause.

Ward v. *Apprice*, 6 Mod. 264, 87 Eng. Rep. 1011 (Q.B., 1705); see also *Pierre* v. *Louisiana*, 306 U.S. 354, 361-62 (1939); *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208, 221 (1939); 2 J. Wigmore, *A Treatise on the Anglo-American System of Evidence*, §291 at 187 (3rd. Ed. 1940).

[32] There is no question that Dacies had worked with a number of black bricklayers at many different jobs. The district court

of known black bricklayers from the company's own records or the telephone directory. Despite Dacies' knowledge of Smith, Samuels and other qualified blacks, the number of blacks on his list remained the "inexorable zero". *Teamsters* v. *United States, supra,* 431 U.S. at 342, n.23.

Dacies, moreover, did not need telephone numbers for Smith and Samuels, since he met them personally at the gate when they sought to apply for work at the Interlake site. Most importantly, Dacies approached Smith at the job site in August and stated "[y]ou can go—you might as well go home, Smitty, I will call you when the job is ready, when I am ready to hire people" (Tr. 871). Despite this representation Dacies did not call or hire Smith until two months later, after he had recruited and hired thirty-seven whites who had not sought work on the Interlake job, and only after he had been directed by Wright to consider employing Smith because of the threat of litigation.[33]

b. *Nemhard:* Since Nemhard was not known to Dacies prior to the Interlake job, it is necessary in resolving his claim to consider in detail whether Furnco's asserted de-

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erroneously sustained Furnco's objection to the plaintiffs' question directed to Dacies concerning the number of times he worked with blacks and the number of blacks with whom he had worked. See *supra* at n.10.

In its brief petitioner suggests Dacies lacked these telephone numbers because he had been working outside of Chicago prior to the Interlake job. Brief for Petitioner, p. 8, n.8. Dacies himself adduced no such explanation at trial. Nothing in the record suggests that Dacies had *ever* had a black on his list. The record shows that prior to the Interlake job Dacies was employed by Furnco at another job in the Chicago area. Tr. 343-44.

[33] There is substantial evidence that Dacies did not hire Smith because this might have led to hiring other black bricklayers as well. See *infra* at p. 32.

fenses—that Furnco and Dacies do not "hire at the gate",[34] that they do not accept applications and that Dacies only hires persons known to him or "referred" by another appropriate person[35]—are true and, if true, whether they were neutrally motivated and applied. The record demonstrates not only that Furnco failed to meet its burden of demonstrating such neutral motivation and application, but also that these policies were a pretext adopted and manipulated by Dacies in order to minimize the number of black bricklayers at the Interlake job.

Insofar as petitioner suggests that Furnco had a practice of not accepting applications at the gate, the record in the case conclusively demonstrates that that was not the case. No witness ever testified that Furnco in fact forbade accepting such applications. Furnco's general manager Wright testified that the company imposed no rules whatever on superintendents, but permitted them to hire as they

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[34] The difference between Furnco's and Dacies' practices is obscured by the use of the phrase "hire at the gate."

At times the phrase is used fairly literally to denote hiring as bricklayers men standing at the gate of a job site without inquiring into their skills and experience. Thus Wright testified Furnco had a "policy", admittedly not enforced, of not hiring at the gate *because* there was no assurance of a man's ability. Tr. 671. Similarly Larkin testified at the FEPC hearing that, although he did take names of men at the gate and consider them for future vacancies, he did not "hire at the gate." Transcript of hearing of August 10, 1970, pp. 200-207.

Petitioner uses the phrase to refer to "the accepting of applications at the job site gate." Brief of Petitioner, p. 6, n.6. Thus when petitioner asserts Furnco "never hired at the gate", the assertion is true literally but false in the sense intended by petitioner. See Appendix pp. 18, 19.

[35] Petitioner in its brief variously describes the persons from whom Dacies would accept a referral as another supervisor, a Furnco bricklayer and any other reliable source. Brief of Petitioner, pp. 6, n.4, 8, 18, n.14, 21, 25, 26. The district court opinion states somewhat ambiguously that Dacies hired those "who were recommended as being skilled in such work." A. 13.

saw fit. Wright suggested that he or the company had "guidelines", embodying possibly preferable practices, but conceded that these were neither binding nor enforced and offered no claim that they were adhered to by most or any supervisors.[36] The record makes clear that prior to the Interlake job blacks had in fact obtained employment with Furnco by applying at the job site, and that this was the only way blacks had been able to work for Furnco.[37] Two Furnco supervisors, Larkin and Urbanski, advised plaintiffs that the way to get hired by Furnco was to apply at the job site.[38] The critical fact about the practices used to exclude Nemhard is that they were fashioned and adopted by Dacies, not imposed by higher management.

The issue is thus whether Dacies' policies of hiring only bricklayers whom he knew and of refusing to consider blacks who applied at the gate—policies at variance with those of other Furnco supervisors—were adopted and applied in a nondiscriminatory manner. The evidence clearly demonstrates that they were not.

First, Dacies' policies were, as we have shown, intentionally manipulated to exclude Smith and Samuels on the basis of race. Dacies' creation and use of an all-white list, excluding all blacks with whom he had ever worked, was an act of intentional discrimination. If, as petitioner asserts, Dacies had always applied the same practices and hired from his list, that compels the conclusion that Dacies had never hired a black before the Interlake job, and demonstrates that the practices were part of a consistent policy of racial discrimination. At the least these other acts of discrimination by Dacies were "highly relevant to the issue

[36] Tr. 686.

[37] See *supra* at nn.4-5.

[38] Tr. 237, 327.

of [his] intent" in refusing to accept or consider applications at the Interlake job. *Keyes* v. *School District No. 1*, 413 U.S. at 207.

Second, Dacies' decision to refuse to accept applications at the gate abruptly sealed off the only avenue previously open to blacks to get jobs with Furnco. Such departures from past practice are inherently suspect. *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. at 267. Dacies apparently did not disclose this change in practice to other Furnco supervisors, who continued to advise black bricklayers to apply for work at the Interlake site. Although petitioner contends that this change in practice would also have foreclosed whites from so applying, there is no evidence in the record that whites had ever sought employment in that manner.

Third, Dacies' behavior toward the blacks who applied at the gate was deceitful, hostile, and evasive. He lied to Smith and others[39] telling them he was not yet hiring,[40] and falsely told Smith he would call him when the job was ready[41] but did not do so. He took the name and address of another black bricklayer, Pearson, in August, but never called him.[42] On another occasion he threw away a list of four qualified black bricklayers given him by Samuels and

[39] Tr. 163-64, 251-52, 255, 457, 525, 556, 871.

[40] The record makes clear that Dacies commenced work as a supervisor on August 14, began recruiting whites within 10 days and thereafter hired continuously until the end of September. Although the exact dates of Dacies' statements to the black applicants are not clear, there was no time after he began work when it would have been accurate to assert that he was not hiring. Tr. 805. A similar false assertion that no work was available was condemned in *United States* v. *Ironworkers Local No. 8*, 315 F. Supp. 1202, 1206, 1207, 1208 (W.D. Wash. 1970), *aff'd* 443 F.2d 544 (9th Cir. 1971).

[41] Tr. 871.

[42] Tr. 566-67.

Waters.[43] He purposefully avoided Nemhard and other blacks by leaving the job from different gates and by refusing to stop to talk to them, and on one occasion almost ran Nemhard down while trying to avoid him.[44] Such behavior cannot be reconciled with the good faith policy petitioner alleges Dacies was following. Cf. *United States* v. *Sheet Metal Workers, etc., Local 36,* 416 F.2d 123, 128, n.8 (8th Cir. 1969).

Fourth, and most importantly, Dacies never advised any of the black job seekers of the hiring policies which petitioner asserts Dacies was following throughout this period —that Dacies would not hire bricklayers applying at the job site, that Dacies would not accept applications, or that Dacies would consider those black applicants if, but only if, a Furnco employee would "refer" their names to him. The existence of these alleged policies was first disclosed to plaintiffs in Furnco's Answer and subsequent depositions. The very secrecy of this ostensible policy is critical, not merely because it calls into question Dacies' good faith, but because the information would have greatly assisted the black jobseekers to obtain work. If plaintiffs had known in 1971 that Dacies would have considered them had they been "referred" to him by another Furnco employee, plaintiffs could readily have contacted Furnco employees whom they knew, or sought to meet one and requested such a referral. Instead, Dacies compounded the discriminatory practice of keeping secret the existence of vacancies by also keeping secret the procedure to be followed in obtaining consideration for such a position.

Dacies' conduct is particularly difficult to reconcile with petitioner's claim of non-discrimination when that conduct

[43] Tr. 251-52, 521-22.

[44] Tr. 74, 76. A similar attempt to evade black applicants was condemned in *Sellers* v. *Wilson,* 123 F.Supp. 917 (M.D. Ala. 1954).

is compared with the instructions Dacies received from Wright. Although Wright imposed no constraints on Dacies method of hiring, he did direct him to hire if possible enough black bricklayers to constitute "at least" 16% of the work force. Although Dacies told Wright that he would implement Wright's professed desire for substantial minority employment by getting the names of qualified blacks from Urbanski,[45] Dacies actually hired only a single black in this manner.[46] Despite the fact that Dacies' practices resulted prior to October 10 in the employment of only 4 blacks of 41 bricklayers, less than 10%,[47] compared to Wright's minimum goal of 16%, and despite Wright's instruction that the goal be reached "if possible", Dacies continued to refuse to consider or hire blacks whom he knew were seeking work and whose qualifications he either knew personally or could readily have confirmed. The stark contrast between Wright's goals and Dacies' actions not only fails to establish that Dacies was implementing a non-discriminatory policy selected for non-discriminatory reasons, but compels the opposite conclusion.

There is, moreover, no claim advanced in this case that Dacies rejected Nemhard because Nemhard was, or Dacies believed him to be, unqualified.[48] Dacies simply refused to consider the qualifications of the blacks at the job site, or to consider their proffered verbal or written[49] applications.

[45] Tr. 777.

[46] See *supra* at p. 8, n.14.

[47] J. Alston and R.D. Jones were merely transferred from other Furnco job. A third black, Theodore Alston, was hired upon the referral of his brother. See *supra* at n.13. If the transferees are disregarded, blacks constituted less only 5% of those actually *hired* by Dacies prior to October 10.

[48] Indeed, Wright admitted it was possible that the bricklayers who unsuccessfully sought work at the gate were more competent than the bricklayers actually hired for the Interlake job. Tr. 689-90.

[49] See *supra* at p. 11.

While such a practice, like secret vacancies and secret hiring procedures, is not *per se* unlawful, it is necessarily suspect. Ordinarily the primary legitimate interest of an employer is in hiring the best qualified workers, an interest that is frustrated, not served, by refusing to consider the comparative qualifications of interested job seekers. In adopting Title VII, "[f]ar from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant". *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971). Where, as here, an employer seeks to justify the rejection of black applicants by resort to a criterion which was not and did not purport to be a measure of their actual qualifications, the burden which the employer must bear in proving the criterion was not adopted or applied in a discriminatory manner is particularly heavy.

The record in this case compels the conclusion that Dacies' refusal to hire at the gate was not a neutral, nondiscriminatory policy common to all Furnco supervisors, but his own improvised means of sealing off a flow of blacks he did not want to hire. Not only did Furnco fail to establish that the exclusion of Nemhard was the result of legitimate practices, fairly adopted and applied, but the uncontradicted evidence also demonstrated that those policies were a mere pretext for discrimination.

2. *The Statistical Defense*

Furnco urges in the alternative that it adopted in 1971 a voluntary "affirmative action" plan that resulted in a work force on the Interlake job that was approximately 13% black, and that this exceeded the proportion of blacks

in the area work force.[50] Proceeding from this Court's recent decisions on statistical evidence in Title VII cases, Furnco contends that these statistics are conclusive proof that there was no racial discrimination.

Although statistics may be adduced by either party in a Title VII action, such evidence does not preclude further factual inquiry. This Court has repeatedly held that a disparity between an employer's work force and that of the labor market is evidence of intentional discrimination, but that it is not conclusive. Even where an employer has no minority employees, it is entitled to attempt to rebut that weighty evidence of discrimination by proving that the absence of minority employees was the result of nondiscriminatory business practices adopted and applied in a non-discriminatory manner. *Hazelwood School District* v. *United States*, 53 L.Ed.2d 768, 778-79 (1977); *Teamsters* v. *United States*, 431 U.S. 324, 339 (1977). Conversely, where the proportion of blacks hired by an employer is comparable to the area work force, that fact is evidence of non-discrimination, but it is not conclusive of that issue; a plaintiff is still entitled to an opportunity to show that there were individual or systematic acts of discrimination. Cf. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. at 266, n.14 (1977).[51]

If an employer refuses on the basis of race to hire blacks, it cannot subsequently cure that act of discrimination by merely adopting a program which might be denoted

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[50] Respondents maintain that the proportion of blacks in the area work force exceeded 13%. See *infra* at p. 47.

[51] "If the company discriminates against a black or a woman, it can be called to account for violating Title VII, regardless of the percentage of blacks and women among its [employees]." *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 275, n.18 (4th Cir. 1976), *cert. denied* 429 U.S. 920 (1976).

"affirmative action". "The company's later changes in its hiring . . . could be of little comfort to the victim of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it". *Teamsters* v. *United States,* 431 U.S. at 341-42. Such a violation gives rise to an obligation to provide the victims with back pay and offers of the unlawfully withheld employment. To the extent that voluntary action provides to the victims the relief that a court would order, it reduces the employer's liability to suit, and such action is of course encouraged by Title VII. But voluntary action, however denoted, which benefits *other* blacks does not place the victims in the position which they would have occupied but for the act of discrimination. Similarly, an employer could not by hiring a large number of blacks at the outset of a job acquire a license to discriminate thereafter against other blacks.

Although statistics showing a substantial minority work force might in some cases help to rebut a *prima facie* case, such evidence was largely irrelevant here. In light of the detailed evidence as to the hiring practices at the Interlake site, Furnco was called upon to adduce evidence as to why Dacies had refused to put Smith, Samuels, or any other black bricklayer on his list, and, more broadly, why Dacies had refused to consider black applicants at all. Although Furnco did employ ten black bricklayers at the Interlake job, none of these were hired by Dacies on his own initiative. On the contrary, Dacies only hired these, or indeed any blacks at all, under orders from Wright. The fact that Wright's orders resulted in a significant number of blacks being hired may be evidence as to Wright's motivation, but it tells us nothing about why Dacies acted as he did when not carrying out those orders. Both the four blacks employed in September and the six

blacks employed in October were hired at the insistence of Wright. The only statistic that matters in evaluating Dacies' motive is the percentage of blacks he hired for the positions which he had untrammeled freedom to fill as he wished. That percentage is an "inexorable zero." *Teamsters* v. *United States,* 431 U.S. at 342, n.23 (1977).

Even if Dacies had not been acting at the direction of Wright, the manner in which the blacks were employed vitiated any evidentiary value of Furnco's statistics. Of the ten black employees, six were referred to and hired by Dacies because of threatened litigation.[52] "Such actions in the face of litigation are equivocal in purpose, motive, and performance." *Jenkins* v. *United Gas Corp.,* 400 F.2d 28, 33 (5th Cir. 1968). Of the other four blacks, two were not *hired* at all, but were merely transferred from other Furnco jobs.[53] Of the remaining two blacks, one was a brother of a transferee who was hired after being "referred" by his brother.[54] Although Furnco asserts that it "went out and actively recruited and hired qualified black bricklayers",[55] at most only a single black was ever hired in this manner.[56] Such a statistic is clearly of no evidentiary significance in rebutting plaintiffs' *prima facie* case.

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[52] Petitioner insists that Wright acted in good faith in asking that Dacies hire the blacks involved in the *Batiste* case. Brief of Petitioner, p. 7. But petitioner does not and could not plausibly claim that Wright would have referred these blacks, or even known them, had it not been for the threatened action in *Batiste.*

[53] R.D. Jones and Joseph Alston.

[54] Theodore Alston.

[55] Brief of Petitioner, p. 38.

[56] Cannon. Tr. 781.

II.

Furnco's Failure To Hire Nemhard Was The Result Of Unlawful Perpetuation Of Intentional Discrimination.

In addition to direct acts of intentional discrimination, Title VII prohibits the implementation of employment policies which perpetuate the effect of prior discrimination. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices". *Griggs* v. *Duke Power Company,* 401 U.S. at 430. The record in this case demonstrates that Dacies' policies had just such an effect on blacks, such as Nemhard, seeking employment on the Interlake job.

A. The Referral System

Dacies testified that, in addition to hiring bricklayers known to him personally, he would hire qualified bricklayers who were "referred" or nominated by a bricklayer already employed by Furnco. (Tr. 770). This required not that a bricklayer apply for a job and list a Furnco employee as a reference, but that the existing employee volunteer the applicant's name to Dacies without waiting for an inquiry from Dacies himself. Several bricklayers were in fact hired in this manner for the Interlake job. (Tr. 781, 784). The key to entry into the job via this route was personal acquaintance with a Furnco employee.

This system was similar to that which was held unlawful *Asbestos Workers Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969), and which this Court condemned in *Teamsters,* 431 U.S. at 349, n.32. In *Asbestos Workers* the union only

considered for membership persons related to present members by blood or marriage. Since, as a result of prior pre-Act discrimination, all those members were white, the exclusionary rule precluded minorities from "any real opportunity for membership". 407 F.2d at 1054. In *Asbestos Workers* the minorities intentionally excluded in the past and those who were the victims of the perpetuation were necessarily different; the latter were the relatives of the former. The case illustrates how a practice can perpetuate and extend to one minority worker the effect of past discrimination against another.[57]

Dacies' internal referral system worked in a manner similar to that in *Asbestos Workers.* Hiring through this system required that prospective employees have some friendship or acquaintance with present Furnco employees who would be willing to take the initiative and refer them.[58] In the instant case, however, the overwhelming majority of the workers on the Interlake job were hired off Dacies' list and were white. Since white employees were more likely to know and refer white friends, it is not surprising that the whites hired by Dacies in this manner had been proposed by whites, and that the only black thus hired had been referred by a black. The existence and dis-

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[57] See also *Rock* v. *Norfolk and Western R.R.,* 473 F.2d 1344, 1347 (4th Cir. 1973); *Parham* v. *Southwestern Bell-Telephone,* 433 F.2d 421, 427 (8th Cir. 1970); *Stamps* v. *Detroit Edison Co.,* 366 F.Supp. 87, 103 (E.D. Mich. 1973), *aff'd sub nom. E.E.O.C.* v. *Detroit Edison,* 515 F.2d 301, 313 (6th Cir. 1975), *vac. and remanded on other grounds* 53 L.Ed.2d 267 (1977).

[58] This is not a situation in which the employer accepted applications and required applicants to demonstrate their skill by means of a recommendation from a company employee or other reliable source. In such a case any applicant would have at least some opportunity to establish his qualifications. Here, even though respondents could doubtless have established their skills in this manner, they were not afforded a chance to do so unless a present employee nominated them for consideration.

criminatory impact of intra-race referral patterns have been recognized in a variety of other Title VII cases. See, e.g., *United States* v. *Georgia Power Co.*, 474 F.2d 906, 925-26 (5th Cir. 1973); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 427 (8th Cir. 1979).

The application of this discriminatory system to Nemhard is readily apparent. Smith, as we demonstrated earlier, was intentionally excluded by Dacies on the basis of race from Dacies' list and from employment at Interlake in August of 1971. Had Smith been hired at that time, he would have been in a position to refer other bricklayers whom he knew. Nemhard was just such a bricklayer. Not only was Smith acquainted with Nemhard, it was Smith who had told Nemhard about the Interlake job. (Tr. 74). On several occasions Smith and Nemhard went together to Interlake to seek work as bricklayers. (Tr. 76, 104, 330). Instead of hiring Smith in August, when the period of substantial hiring lay ahead, Dacies did not hire Smith until mid-October, when the job was nearing completion and layoffs were imminent. By then it was too late for Smith to refer anyone. There is, moreover, no indication that Dacies, who never told the black applicants about the insider referral rule, ever revealed it to the black bricklayers he employed either.

The record strongly suggests that Smith was rejected in August precisely because he might have referred other blacks. Smith testified, and Dacies did not deny, that when Smith asked Dacies why he had been hired only toward the end of the job, Dacies replied "if you [had gotten] off to yourself away from the other fellows, I would have hired you". (Tr. 334). Nemhard, of course, was one of "the other fellows".

B. Prior Intentional Discrimination Against Nemhard[59]

As has been discussed, Dacies primarily selected employees from a list of bricklayers who had previously worked with or for him.[60] This list was tainted by discrimination not only because of Dacies' actions in selecting only whites from the pool of employees with whom he had worked, but also because black bricklayers in the area, such as Nemhard, were denied an opportunity to enter that pool because of Furnco's and Dacies' earlier practice of discriminating against black bricklayers.[61]

The evidence in the record, uncontradicted by Furnco, is that Furnco employed only white superintendents in the Chicago area[62] and that until 1969, the company employed only white bricklayers.[63] Dacies' practice of discrimination[64] also limited the opportunity of blacks to work on

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[59] This appears to have been an alternative ground on which the court of appeals based its decision. A7.

[60] See *supra* at pp. 5-6.

[61] The legislative history of the Civil Rights Act of 1964 stresses that waiting lists or referral systems such as this are suspect, and that they are distinguishable from seniority systems. See the Clark-Case Memorandum, 110 Cong.Rec. 7213 (1964), quoted in full in *Franks* v. *Bowman Transportation Company*, 424 U.S. 747, 759, n.15 (1976); see also *United States* v. *Sheet Metal Workers*, *supra*, 416 F.2d at 133-34 n.20.

[62] See *supra* at p. 4.

[63] See *supra* at p. 4. The fact that Furnco did not controvert the testimony that it had never hired a black bricklayer prior to 1969 is highly relevant. See *supra* at p. 4, n.3. Moreover, even after 1969 Furnco used a dual hiring system, one for black bricklayers and one for white bricklayers. See *supra* at p. 5. "Proof of discriminatory motive . . . can in some situations be inferred from the mere fact of differences in treatment". *Teamsters* v. *United States*, 431 U.S. at 335-6, n.15.

[64] There is no evidence that Dacies ever selected a black bricklayer to work on a job for which he had hiring responsibility prior to the Interlake job. On the contrary, the all-white list, and the

jobs supervised by Dacies, whether for Furnco or any other construction company, and to demonstrate their qualifications and entitlement to be placed on Dacies' referral list for future employment. Furnco's dual hiring system, notifying and recruiting whites whenever there was work but only considering blacks who learned of the hiring without such help, was clearly discriminatory; even in the absence of such disparate treatment a secret vacancy rule is inherently suspect.[65] In addition, the district court erroneously excluded other relevant evidence offered by plaintiffs to show that both Dacies and Furnco had discriminated against blacks prior to the Interlake job.[66]

From 1965 through the time of the Interlake job Nemhard regularly looked for work in his trade, bricklaying,[67] by reviewing the help-wanted advertisements and by inquiring at job sites. (Tr. 71).[68] Because of Furnco's and

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testimony by the black bricklayers that they were hired by Furnco superintendents other than Dacies when they finally obtained Furnco work, lead inevitably to the conclusion that Dacies had never employed a black bricklayer prior to the Interlake job. Dacies admitted that he had not recruited a black bricklayer between 1962 and 1969 (Tr. 874). Finally, Dacies' other actions plainly indicate his racial motivation. See *supra* at pp. 22-23.

[65] See *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972).

[66] See *infra* at p. 58.

[67] Mr. Nemhard had been a bricklayer since 1946 (Tr. 66); however, in the years prior to 1965 he had been in business for himself in New York. Tr. 69-70.

[68] Nemhard had worked at two firebrick jobs prior to applying for work at Interlake. Tr. 68, 72. He had not applied for other firebrick jobs. Tr. 73. This is not surprising because Furnco had a "secret" hiring process, and neither advertised for nor accepted applications. The plaintiffs' offer of proof as to the general practice in the firebrick industry was rejected by the district court who flatly announced, "I'm not interested in what the practice is in the industry". Tr. 561.

Dacies' secret vacancy policy, Nemhard had no way of ever knowing whether, when or where Furnco was hiring. It is clear that at least until 1969 Nemhard could not have obtained a job at Furnco even if he had known of a vacancy; whether thereafter he would have been able to enter through Furnco's discriminatory dual hiring system is at best problematic. Since Dacies and Furnco had thus unlawfully denied Nemhard any opportunity to work for either and thus to demonstrate his skills prior to the Interlake job, the use at that job of a preference for prior employees worked a "disproportionate distribution of advantages" in favor of white former employees and thus perpetuated the effect of Dacies' and Furnco's past discrimination against Nemhard. *Teamsters* v. *United States*, 431 U.S. at 350.

Plaintiffs contend that the evidence in the record is thus sufficient to affirm the Seventh Circuit's ruling in favor of Nemhard on this ground. If the Court concludes, however, that the record on this issue is inadequate, a remand is required in light of the district court's erroneous exclusion of evidence of prior discrimination by Furnco and Dacies.

III.

Furnco's Employment Practices Had The Effect Of Discriminating Against Blacks And Were Not Justified By Business Necessity.

A. Since The Seventh Circuit Did Not Consider The *Griggs* Issues, A Remand Is Appropriate

Petitioner presents a variety of issues regarding the meaning of *Griggs* and its progeny. We note at the outset, however, that the resolution in this case of these issues, some of great importance, appears premature.

The findings of the district court relating to the *Griggs* issues are so conclusory and inconsistent as to make meaningful appellate review impossible. The question of whether one or more of Furnco's policies had a disproportionate impact on blacks raises a variety of factual and legal issues. The district court's opinion merely asserts that there was no such impact, with no explanation of the evidence or legal principles on which it was based. A18, A20; see *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). The district court found that business necessity required Furnco to hire only bricklayers known to Dacies personally (A20-21), but it also found that Furnco's actual practices were not limited to hiring such bricklayers, but also included hiring those "recommended" as being skilled in blast furnace relining. (A. 15). No significance can be attached to a district court finding that business necessity required an employer to use an employment practice which the court also found that the employer in fact did not actually use. Even consistent findings on this issue could not be upheld in the face of the district court's refusal to permit counsel for plaintiffs to ask Dacies whether "there are more efficient ways or more effective ways of hiring your crew" than that which Dacie had used. (Tr. 873).

The issues of disparate impact and business necessity were both briefed in the Seventh Circuit, but the court of appeals reached neither issue. Instead, the court of appeals applied the four part *McDonnell Douglas* standard (A6), rejected Furnco's explanation for the rejection of Smith, Samuels and Nemhard and concluded that "racial discrimination is established under the principle of *McDonnell Douglas*". (A8-A9). Having found for plaintiffs on the issue of discriminatory intent, the court of appeals had no occasion to and did not in fact reach the questions raised by the application of *Griggs* to this case.

If the Court does not affirm the finding of liability based on discriminatory intent, it should remand the *Griggs* issues for consideration in the first instance by the Seventh Circuit.

However, should this Court decide to consider the *Griggs* disparate impact issues, plaintiffs contend that the record demonstrates in two distinct ways that Furnco's practices had the requisite disparate impact. A third method of proving adverse impact was in part limited by the district court's erroneous evidentiary rulings. We further urge that Furnco failed as a matter of law to establish that the disputed practices were required by business necessity.

B. Disparate Impact

In *Griggs* v. *Duke Power Company, supra* 401 U.S. at 429-30, this Court recognized that in enacting Title VII Congress sought "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices." Under the *Griggs* analysis, plaintiff need only prove that the practice in question "select[s] applicants for hire in a significantly discriminatory pattern." *Dothard* v. *Rawlinson*, 53 L.Ed. 2d 786, 797 (1977). Once this discriminatory effect is shown, the burden shifts to defendant to demonstrate that its practice is necessary. *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431. If the employer demonstrates business necessity, plaintiff can then show the availability of procedures that have a lesser racial impact. *Albemarle Paper Co.* v. *Moody*, 411 U.S. 405, 425 (1977).

1. *Dacies List*

The first disparate impact claim of plaintiffs Smith, Samuels and Nemhard rests on the argument that Dacies' use of an all-white list had the effect of excluding *all* black bricklayers from each job filled off the list. Furnco offers three arguments against this analysis. First, Furnco challenges the existence of the list. Second, it suggests, that the Dacies' list was in fact integrated from the outset of the Interlake job. Third, Furnco contends that it was free to use a hiring criterion with a disparate impact in selecting most of its work force so long as its other hiring procedures yielded a total minority work force comparable to the area work force. All of these arguments are without factual or legal support.

(a) *The Existence of the List.* There is no need to restate Dacies' testimony on the existence of the list except to reiterate that it was Dacies who characterized his practice as hiring off a "list". (Tr. 769-70). The Seventh Circuit properly concluded that Dacies hired off a list. (A. 2). In fact, Furnco admits that Dacies had a list (which it prefers to call "various notes") and that Dacies' list was limited to white bricklayers. (Brief of Petitioner p. 8, n. 8, p. 34, n. 29).

(b) *The Alleged Integrated List*—Furnco suggests that, prior to the commencement of the Interlake job, Dacies ceased using an all-white list and assembled an integrated list. If the list was in fact integrated, and contained a proportion of blacks comparable to the area work force, that might be of relevance under *Griggs.*[69]

This factual assertion is presented for the first time in this litigation in the Brief of Petitioner, p. 34. Counsel for Furnco never advanced any such assertion in the lower

[69] It would not, however, rebut respondents showing that Dacies' practice had an adverse racial impact as applied to the actual applicants.

courts. No witness at trial ever claimed or suggested that there was such an integrated list. Consequently, the trial court made no finding on this issue and the court of appeals found on the undisputed evidence in the record that during the Interlake job Dacies' list contained only the names of whites. (A. 8).

It is certainly clear that Dacies had no black names at all when the job started. When Wright telephoned Dacies and asked him to hire at least 16% blacks, Dacies indicated that he had no names of blacks, but would have to get them from others. (Tr. 777). At some later time Dacies did call Urbanski for names, but did not then get any. Only "subsequently" to this second call did Dacies get any names and telephone numbers of blacks, and there is no clear evidence that Dacies ever used that information. (Tr. 778). Dacies testified on cross-examination that he could not recall whether he had ever telephoned a single black during the Interlake job. (Tr. 877). Of the four blacks hired prior to October 12, 1975, the two transferees were contacted by supervisors Larkin and Urbanski, and Theodore Alston was contacted by his brother Joseph Alston. No more than one black hired, Cannon, could have been called by Dacies, and neither he nor Dacies testified that any such call had ever occurred.

The record thus proves that the list from which Dacies recruited most Interlake employees included no blacks at the outset of the job, when plaintiffs first applied, and contains no evidence that there were ever any blacks on that list. There were, of course, blacks hired for the Interlake job, but, unlike the whites, they were not hired by being recruited by Dacies from his list of known bricklayers. The blacks, rather, were hired through an entirely different procedure—most notably by being offered jobs in October through the intervention of Wright and after threatening to sue.

(c) *Furnco's "Whole Hiring Process" Argument*—Furnco does not deny that the exclusive use of Dacies' all-white list would have had the requisite disparate impact. But the company argues that any violation from the use of the list was cured by its alleged "affirmative action" program, which resulted in a work force at the Interlake job comparable to the area work force. Thus, the real issue is what constitutes the proper focus for determining the effect of Furnco's hiring practice on blacks: is it Dacies' practice of hiring from his all-white list, or is it the combined Dacies-Wright practice of hiring off Dacies' list plus supplementing the work force with blacks? Only one answer to this question is consistent with the purposes of Title VII and the decisions of the courts, including this Court. Where an employer fills a significant portion of his jobs with a hiring practice that excludes identifiable blacks, that practice cannot be immunized by "affirmative action programs" that benefit other blacks for a limited number of jobs.

The purpose of Title VII is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens". *McDonnell Douglas, supra,* 411 U.S. at 801. That purpose requires employers to eliminate *all* hiring mechanisms that exclude blacks, with the end of fostering equal opportunity regardless of race for every job the employer offers. It is not enough merely to use the discriminatory practice to fill less than all of the jobs. That does not eliminate the practice. As to all jobs filled by the discriminatory practice, blacks continue to be denied an equal opportunity for employment. The alternative proposed by Furnco—to maintain a discriminatory hiring system, then to "compensate" for its effects by earmarking a certain number of jobs for blacks—is a grotesque parody of this

goal of equal opportunity as to all jobs. Title VII places on an employer whose practices are unlawful two distinct obligations—to abandon those practices, and to take such affirmative action as may be necessary to undo any continuing effect of those practices and to place the victims of discrimination in the position they would have occupied but for that discrimination.[70] Affirmative action, by itself, is no substitute for the required cessation of unlawful employment practices.

Griggs held that, in enacting Title VII, Congress mandated "the *removal* of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of race or other impermissible classification." 401 U.S. at 431 (Emphasis added). *Dothard* emphasized that Title VII "*prohibits* the application" of such standards. 53 L.Ed.2d at 799 (Emphasis added). An employer cannot retain such discriminatory requirements by the simple expedient of specially recruiting more of the handful of blacks who may be able to meet it, or of waiving that requirement, not for all blacks, but only for enough blacks to raise the minority work force to some given level.[71]

The lower courts have rejected Furnco's contention that a substantial level of overall minority employment can render lawful specific practices which would otherwise violate *Griggs*. For example, in *Johnson* v. *Goodyear Tire &*

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[70] "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . ." 42 U.S.C. 2000e-5(g). A similar dual obligation is imposed on government contractors by Executive Order 11246.

[71] In *Whitus* v. *Georgia,* 385 U.S. 545 (1967), this Court held that where a jury list was tainted by racial discrimination, a state could not continue to use the list merely by supplementing it with the names of additional blacks.

Rubber Co., 491 F.2d 1364 (5th Cir. 1974), plaintiffs challenged the discriminatory effect of certain tests on black applicants. Defendant attempted to refute this argument by directing the Court's attention "to many statistics which it asserts establish that it has transferred black employees from the labor department and hired blacks from the Houston area in a ratio equivalent to the total black population in the area." The Fifth Circuit rejected that argument:

> Such evidence does not disprove the essential finding that the tests have a detrimental impact on black applicants. It merely disclosed that Goodyear has attempted by other practices to remove the taint of the tests' consequences. The fact still remains that for those potential black hirees and black labor department transferors, these unvalidated testing devices have a substantial invidious effect. 491 F.2d at 1372-73.

See also, *Green* v. *Missouri Pacific Railroad Company*, 523 F.2d 1290 (8th Cir. 1975); *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F.Supp. 873, 893-94 (D.C. Cal. 1976); *cf. Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1348-49 (8th Cir. 1975), *vacated and remanded on other grounds*, 423 U.S. 809 (1975).

No different rule is adopted by the cases relied on by Petitioner, *Smith* v. *Troyan*, 520 F.2d 492 (6th Cir.), *cert. denied* 426 U.S. 934 (1976), or *Kirkland* v. *New York State Department of Correctional Services*, 374 F.Supp. 1361 (S.D.N.Y.) *aff'd* in relevant part, 520 F.2d 420, *cert. denied* 429 U.S. 823 (1976). Both assert that an employer does not have to demonstrate the "job relationship" of a "*subtest*" within a battery of tests, if the overall battery does not have an adverse effect. *Smith* v. *Troyan*, 520 F.2d at 498-99; *Kirkland* v. *New York State Department of Correctional Service*, 374 F.Supp. at 1370. In *Smith* and *Kirkland* no single "subtest" determined who

was hired. An applicant took all of the subtests and the decision to hire was based on the results obtained by each applicant on the entire battery. Here the use of the all-white referral list was a separate, distinct part of the employment process which acted as an "artificial, arbitrary, and unnecessary barrier[s] to employment" of black bricklayers, *Griggs* v. *Duke Power Co.*, 401 U.S. at 431. Unlike an employee who could overcome a poor showing on one subtest by a better showing on another, an employee who was not on Dacies' list was absolutely precluded from consideration for the 42 jobs filled from that list.

Petitioner's position is not supported by the proposed governmental "Uniform Guidelines on Employee Selection Procedures", 42 F.R. 65542 (Dec. 30, 1977). The governmental agencies expressly recognize that a component part of a selection process which has an adverse impact may be unlawful even if the overall selection process has no adverse impact. Section 4C states that where there is no adverse impact in the overall process "the federal enforcement agencies . . . *generally* will not take *enforcement action* based upon adverse impact of any component of that process . . . ." (emphasis added). "Enforcement action" is defined in §16(i) as a "lawsuit, or a formal administrative proceeding . . . but *not* a finding of reasonable cause [to believe that the allegations of a charge of discrimination are valid]". These sections make clear that the federal enforcement agencies agree that a part of a selection process is unlawful if it has an adverse effect, regardless of the overall impact of the process, and that upon such a showing an aggrieved individual is entitled to a "reasonable cause" decision. The guidelines state only that as an exercise of administrative discretion in allocating enforcement priorities, the agencies "generally" will not institute an enforcement action concerning a part of a selection process if the overall process does not have an adverse impact.

If Furnco's contentions were accepted, an employer could fill 90% of its positions by administering a non job-related test which only whites could pass, and then extinguish the rights of the rejected black applicants by filling the remaining positions with other blacks who had never applied for the job or taken the test. Simliarly, if an employer used a test on which blacks scored better than whites to fill half its positions, it might in that manner acquire a license to use for the rest of its vacancies a selection criterion which violated *Griggs*. In either circumstance Furnco's approach would convert *Griggs* into a legal sanction for deliberately adopting a set of hiring criteria which would prevent minority employment from rising above its proportion in the area work force.

Furnco's self-styled "affirmative action" plan did not meet its legal obligations. The use of Dacies' all-white list had, by itself, a clear adverse impact on all qualified black bricklayers who actually sought work at Interlake. Furnco's policy of keeping its vacancies secret extended that impact to all qualified black bricklayers who would have applied had they known there were jobs. Faced with this situation Furnco chose, not to replace the list with some other criterion with no racial impact, but to keep the list in use and to make an exception to this requirement for ten, and only ten, black bricklayers. As the Seventh Circuit found, "Most of the jobs (approximately 84-87%) were foreordained to be filled by white bricklayers. At all times, these were to be filled from Dacies' list, naming only white bricklayers." (A8).

In sum, the facts and the law fully support plaintiffs' claim that Dacies used an all-white list to fill most of the jobs at Interlake and that the use of that list had the requisite impact to shift the burden to Furnco to justify its practice by a "business necessity". Before considering

whether Furnco met its burden, plaintiffs examine two additional ways in which Furnco's practices had an adverse impact.

2. *Applicants*

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, 425 (1975), provides that a plaintiff may demonstrate the disproportionate impact of a hiring practice by measuring its effect on persons seeking employment. The use of such data, rather than merely analyzing the effect of a practice on the area work force, is particularly appropriate in a case such as this where black unemployment was 150% higher than white, and blacks were thus likely to constitute a disproportionately large portion of those seeking work.[72] In the instant case plaintiffs proved that at least eight black[73] bricklayers sought work at Interlake; because of Dacies' practices none of these applications were ever considered. The record contains no evidence that any whites ever sought work at the Interlake site or were in any way affected by Dacies' refusal to consider such applicants.[74] In view of the fact that whites had traditionally been recruited individually, while only blacks were required to apply at the job site, it is hardly surprising that whites did not seek employment through the route traditionally used only by blacks. An exclusionary hiring practice which

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[72] Def. X21, p. 10.

[73] A17; Tr. 74, 77 (Nemhard), 158-59 (Gilman), 248, 249, 251-53, 256 (Samuels), 327-29 (Smith), 397 (Williams), 454, 456-60 (Hawkins), 519, 522-23, 525 (Waters), 505-67 (Pearson).

[74] A7. Petitioner's brief asserts that whites "appeared" at the gate. Brief for Petitioner, p. 16, n.11. The record however, indicates that the whites seen near the gate were not seeking work, but were on their way onto the site where they were already employed. Furnco offered no evidence that whites had applied for work at the job site

in fact excludes only blacks clearly has a disparate impact within the meaning of *Griggs* and its progeny.

3. *Furnco's Hiring Prior To October 10, 1971*

Dacies' hiring practices changed substantially after October 10, 1971. Prior to that date 37 of those hired were whites from Dacies' list and 4 were blacks known to other Furnco employees. These 41 employees worked over 94% of the man days on the job. After October 10 Dacies departed from the exclusive use of his list and inside referral, and hired six black bricklayers under threat of litigation. Respondents maintain that the effect of Dacies' practices must be analyzed separately for the period to October 10, and that the combined practices in effect during that period clearly had a disparate impact.

We urge that in assessing the impact of Dacies' *hiring* practices it is necessary to disregard the two blacks who were merely transferred from other Furnco jobs. If that is correct, blacks constituted only 2 of the 39 hires, or about 5% of the hires. The courts below, however, did not discuss the difference between persons hired for the Interlake job and those transferred to it.

Plaintiffs sought to introduce at trial evidence as to the number of blacks and whites hired at other Furnco jobs. This would have corroborated our claim that the disputed practices generally resulted in the hiring of only a handful of blacks. The district court, however, erroneously concluded this evidence.[75]

[75] Tr. 377-83. The proffered evidence was that there were only 7 blacks out of 195 bricklayers hired at the two Furnco job immediately prior to Interlake. This 3.5% figure was consistent with the data for Interlake. PX 9, 10; Tr. 377-79, 382-85.

The parties are in disagreement as to the proportion of blacks in the relevant labor market. Respondents sought to introduce evidence that as of 1973 some 13.7% of the members of the Bricklayers Union in the Chicago area were black. Although the district judge rejected this evidence, the court of appeals found that exclusion an abuse of discretion, a finding of which petitioner has not sought review in this Court.[76] (A. 9)

The question of whether the hiring practices in operation prior to October 10, 1971, had a discriminatory impact should be remanded for consideration in the first instance by the lower courts. Although the evidence indicates that Furnco hired only about 5% black bricklayers, compared to an area minority work force of 13.7%, the district court, because of its erroneous evidentiary ruling, never understood the relevant facts. The court of appeals, as we noted, never reached the *Griggs* issues at all.

[76] The 5.7% figure relied on by petitioner and the district court was taken from the 1969 Chicago plan prepared by the federal government under Executive Order 11246. 30 Fed. Reg. 12319; Def. X21, Tr. 618-20. This figure was based on a six county area, only a fraction of which was within Cook County. The manner in which the 5.7% figure was arrived at by the authors of the plan is not disclosed. Plaintiffs' objected to the introduction of this figure without such a foundation; the district court erroneously overruled that objection. Tr. 619-20. Most importantly, the magnitude of the figure was asserted by the author of the plan to be so low as to constitute evidence of racial discrimination. "[T]he most skilled and most remunerative trades have a level of minority representation far below that which should have resulted from meaningful past participation in the industry without regard to race, color, or national origin." Def. X21, p. 17.

C. Business Necessity[77]

Griggs permits an employer to use an employment practice which has a disproportionately adverse impact on minorities only if that practice is required by "business necessity". In *Griggs, Albemarle* and *Dothard* the practice was a test or job requirement that ostensibly measured the ability of applicants to perform the work in question; in that context the business necessity rule was held to require the employer to demonstrate that its test or standard actually "measure[s] the person for the job and not the person in the abstract". *Griggs* v. *Duke Power Co.*, 401 U.S. at 436. This case presents a wholly different type of employment practice. Furnco does not claim that it rejected plaintiffs because they were, or because it believed them to be, unqualified. On the contrary, Furnco never considered the actual qualifications of Smith, Samuels or Nemhard.

Furnco failed to offer any direc testimony to meet its burden of proving that Dacies' p actices were necessary. Neither Dacies nor Wright testified that the practices were essential to the operation of the company. Wright conceded that Furnco did not require Dacies to adhere to the disputed practices,[78] a permissiveness entirely inconsistent with any claim that those particular practices were neces-

[77] The decision of the district court contains a statement that "Furnco's hiring policies were justified as a business necessity". A20-A21. This statement is devoid of significance. It is at best unclear whether this refers to Furnco's past practice or Dacies' practice at the Interlake job; the district judge does not appear to have understood that these practices were not the same. The court's earlier justification of Furnco's practices refers only to "not hiring at the gate" in the literal sense. See A17-A18; n.34 *supra*. Respondents contend that, as a matter of law, a practice of not accepting applications cannot be employed where it has a disproportionate impact on blacks.

[78] Tr. 686.

sary to protect Furnco's interests. Dacies agreed that he had made no effort to ascertain how other supervisors hired and such an inquiry would have revealed that other supervisors did accept applications.[79] The undisputed evidence shows, that other Furnco superintendents accepted applications from blacks who came to the job site, which clearly demonstrated that Dacies' refusal to do so could not have been required by business necessity. Not only did counsel for Furnco not ask Dacies if there were other efficient and effective means of hiring bricklayers, but they objected when counsel for plaintiffs sought to do so.[80]

Although Furnco's witnesses did not claim at trial that Dacies practices were required by business necessity, Furnco's counsel does advance such an argument in this Court. The interest asserted by the employer in rejecting plaintiffs was not that their qualifications were assessed and found wanting, but that the very process of accepting applications and assessing those qualifications would have been an administrative inconvenience. Whether, and if so under what circumstances, such administrative considerations can constitute business necessity, and thus permit an employer to refuse to consider at all the skills of a disproportionately minority group of potential employees, is a novel question not heretofore considered by this Court or any lower federal court.[81]

[79] Tr. 872-73.

[80] Tr. 872-73.

[81] The opinion of the court of appeals notes that such considerations fall outside what *Griggs* had recognized as relevant to business necessity. A7-A8. Although the Seventh Circuit opinion could be read to hold that only merit considerations can ever constitute business necessity, we do not advocate such a rule, and such a rule is not necessary to sustain our position that, as a matter of law, business necessity was not shown in this case.

The legislative history of Title VII does not address this issue directly. Several aspects of that history, however, throw considerable light on this matter. First, the basic policy of Title VII is to require that employment decisions be made on the basis of merit, and that applicants for employment be afforded an equal opportunity to compete for a job on that basis[82] *Griggs* v. *Duke Power Co., supra.* That policy is clearly frustrated where an applicant is forbidden to enter the competition at all. Second, while Congress was concerned to eliminate practices which gave whites a marginal competitive advantage, the most egregious form of discrimination, and that most responsible for the adoption of Title VII, was the absolute refusal of employers even to consider minorities for certain positions. Third, in view of its awareness of the wholesale exclusion of blacks by certain employers, it is difficult to believe that Congress intended to permit an employer to refuse to even consider the qualifications of a black applicant merely because the black had not worked for the employer in the past.

The refusal to even consider an applicant has, moreover, a far more drastic effect than a test or other standard. Frequently a job requirement, if upheld as job related, will be one which the employee can try to meet by education or study. Often, where a variety of considerations bear on an employer's decision, an employee's weakness in one area, such as a low test score, can be overcome by strength in another, such as practical experience. The practice in the instant case, however, was an absolute and, for all practical purposes permanent, bar to employment.

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[82] Petitioner would have this Court disapprove as abberational such merit based competition. Brief for Petitioners, pp. 26-28. Regardless of whether a large number of blacks may have superior qualifications, petitioner suggests that it met its Title VII obligation in the ideal manner by adhering to the hiring quota equal to the proportion of blacks in the work force.

The employer's interest which may at times support the use of a job requirement with an adverse impact—finding the best qualified employee—militates *against* any practice limiting who will be considered for a job. The "administrative convenience" adduced here is a wholly different sort of employer interest. It does not aid, and may well inhibit, the hiring of the employees who can best perform the work, and serves, at most, to reduce the responsibilities of personnel officials.

In light of these complementary considerations, the "business necessity" required to justify a practice of excluding from consideration a group of qualified and disproportionately black job seekers should be limited to only two circumstances. First, an employer may establish reasonable rules as to the time, place, and manner in which a job seeker may apply, and may exclude from consideration those who do not comply with those rules. These rules must in fact serve important administrative needs, must be fully and fairly disclosed to actual and potential job seekers, and must be applied in a non-discriminatory manner. Second, an employer may place on the applicants the burden of establishing their competence or level of skill. Thus if prior satisfactory work experience is a job-related requirement, the employer could demand that the employee provide information demonstrating such experience and the name of a supervisor or other person who could attest to the level of his past performance.

Enforcement of such rules is, we believe, all that is encompassed within the "business necessity" which may be asserted to justify refusing to consider qualified black applicants. It could be urged that providing any opportunity for qualified job seekers to apply poses a minor inconvenience to the employer, that administering a fair competition for jobs, even on a first come first served basis, is

a marginal burden compared with a policy of favoritism for friends, acquaintances, or former employees, whether such a policy is administered through a no-application, selective recruiting, or secret vacancies rule. In enacting the Equal Employment *Opportunity* Act, however, Congress cannot have intended to credit such arguments, or have contemplated that an employer could defend on such a basis a practice that might result in the total exclusion of blacks from its work force.

In the instant case, Furnco did not reject respondents because they had applied too late, or in the wrong manner, or because they had failed to adduce evidence of their qualifications. Petitioner suggests that it might have been difficult to confirm whether respondents or other possible applicants were qualified, but Furnco neither attempted to do so itself nor permitted or asked those applicants to do so. In fact, the qualifications and experience of Smith and Samuels could immediately have been confirmed by Dacies' personal knowledge or Furnco's own records, and Nembhard could have established his abilities through his prior experience and appropriate references known to Dacies or Furnco. Furnco does not, and could not, claim it was more convenient for Dacies to search for out-of-work whites whom he had worked with in the past than to hire the black bricklayers, Smith and Samuels, whose skills and availability were already known to him. Petitioner does appear to assert that it would have been more burdensome for Dacies to call a reference provided by a black job seeker of unknown skill than to search for a white former Furnco employee to work on the Interlake job. As a factual proposition this borders on the frivolous;[83] as a matter of law it

[83] Furnco erroneously asserts that it is "undisputed" that Dacies would not have had time to check references. Brief for Petitioner, p. 24, n.19. Dacies never so testified. The testimony relied on by petitioner is a statement by Wright that a supervisor would not have "a lot of time" to do so. Tr. 707. Petitioner does not claim that it would not have been possible for other Furnco employees to check references on Dacies' behalf.

is simply not the type of consideration which amounts to business necessity under Title VII.

IV.

The "Clearly Erroneous" Rule Does Not Require Or Permit Affirmance Of The District Court's Judgment For Petitioner.

Furnco maintains that the findings of the district court were not clearly erroneous, and that the court of appeals therefore erred when it reversed those findings and "substituted its own judgment" for that of the trial judge.

Although a district court's findings of fact must be upheld unless "clearly erroneous", no such deference is accorded a lower court's conclusions of law. Rule 52(a), Federal Rules of Civil Procedure. Rule 52(a) also has no application to findings of fact induced by an erroneous view of the law[84] or to findings that combine issues of law

[84] *Hazelwood School District* v. *United States*, 53 L.Ed.2d 768 (1977) (district court in finding no discriminatory intent "misconceived the role of statistics in employment discrimination cases"); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n.9, 83 S.Ct. 1773, 1784 n.9 (1973); *Senter* v. *General Motors Corp.*, 532 F.2d 511, 625 (6th Cir. 1976), *cert. denied*, 97 S.Ct. 1897 (1977); *Martinez* v. *Dixie Carriers*, 529 F.2d 457, 469 (5th Cir. 1976); *Harrison* v. *Indiana Auto Shredders Co.*, 528 F.2d 1107, 1120 (7th Cir. 1976); *Ritter* v. *Morton*, 513 F.2d 942, 949 (9th Cir. 1975); *Whelan* v. *Penn Central Co.*, 503 F.2d 886, 892 (2nd Cir. 1974); *Ammerman* v. *Miller*, 488 F.2d 1285, 1300 (D.C. Cir. 1973); *Owen* v. *Commercial Union Fire Ins. Co. of New* York, 211 F.2d 488, 489 (4th Cir. 1954); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 356 n.15 (5th Cir. 1972); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372 n.20 (5th Cir. 1974).

and fact.[85] The district court opinion provides little indication as to the judge's view of the contested legal issues, and there are no findings on many of the critical issues of fact. The court of appeals acted properly in holding that plaintiffs had proven a violation of Title VII, since here, as in many Title VII cases,[86] such a finding was required by application of established legal principles to largely undisputed evidence as to what had actually occurred,[87] and the inferences mandated by *McDonnell Douglas* could not be overcome by generalized denials of an intent to discriminate.[88]

Ordinarily the legal principles applied by a trial judge in reaching his ultimate conclusion can be ascertained from his opinion. In this case, however, the findings of the district judge, heavily relied on by defendant in this Court, were apparently written by counsel for the defendant. On January 31, 1975, at the end of the trial, the judge ruled for defendant from the bench, and asked defense counsel to prepare "a short finding of facts in regard to witnesses who testified and a judgment order" by Friday, February 7. The findings signed by the District Judge were filed by the court on Monday, February 10. It is not possible to directly compare the findings signed by the judge with those drafted by defense counsel, for the latter were never

[85] *United States* v. *United States Gypsum*, 333 U.S. at 396.

[86] In *Dothard* v. *Rawlinson*, 53 L.Ed.2d 786 (1977), for example, this Court upheld the district court's finding of disparate impact, not by reference to Rule 52(a), but by considering the relevant evidence in light of the applicable legal principles.

[87] See *Norris* v. *Alabama*, 394 U.S. 586, 590 (1935); *Whitus* v. *Georgia*, 385 U.S. 545, 550 (1967).

[88] *Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972); *Whitus* v. *Georgia*, 385 U.S. 545, 551 (1967); *Eubanks* v. *Louisiana*, 356 U.S. 584, 587 (1958); *Reece* v. *Georgia*, 350 U.S. 85, 88 (1955); *Hernandez* v. *Texas*, 347 U.S. 475, 481 (1954); *Smith* v. *Texas*, 311 U.S. 128, 132 (1940); *Norris* v. *Alabama*, 294 U.S. 580, 589 (1935).

served on counsel for plaintiffs and are not in the record. When counsel for plaintiffs subsequently sought a copy of the defendant's proposed findings in order to make such a comparison, defense counsel was unable to locate a copy. In the court of appeals plaintiffs repeatedly asserted,[89] and counsel for defendant never denied, that the defendant's proposed findings and the district judge's opinion were identical. Findings drafted by counsel after the district judge has already reached a decision in a case are not, and could not be, a meaningful indication of the legal and factual reasoning leading to that decision.[90]

The findings signed by the District Judge, however prepared, is insufficient to permit the meaningful appellate review contemplated by Rule 52(a) of the Federal Rules

[89] Brief for Appellants, pp. 3, 14.

[90] "Findings and Conclusions prepared ex post facto by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule [Rule 52(a), Federal Rules of Civil Procedure]", *Roberts* v. *Ross*, 344 F.2d 747, 751-52 (3rd Cir. 1965); see *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964).

The mechanical adoption by the court of proposed findings and conclusions prepared by counsel creates considerable doubt that the court reviewed the facts with the care necessary to insure that they support the decision, *United States* v. *Forness*, 125 F.2d 928, 942 (2nd Cir.) *cert. denied* 316 U.S. 694 (1942). Where, as in this case, the court adopts findings and conclusions prepared by counsel *after* the court announced its decision, those findings and conclusions cannot adequately reflect the reasoning process used by the court in reaching its decision; moreover, these findings and conclusions, prepared by zealous counsel, may be one-sided or even unsupported by the record, *Roberts* v. *Ross, supra* at 751-52. The appellate courts have condemned this "unfortunate practice" and they carefully scrutinize such mechanically adopted findings and conclusions. *In re Las Corlinas, Inc.*, 426 F.2d 1005, 1008-09 (1st Cir.) *cert. denied* 405 U.S. 1067 (1972); *United States* v. *Forness, supra* at 942-43; *Roberts* v. *Ross, supra* at 751-52; *The Severance*, 152 F.2d 916, 918 (4th Cir. 1945); *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310, 314 n.1 (5th Cir.), *cert. denied* 98 S.Ct. 767 (1978); see also Wright and Miller, Federal Practice and Procedure, §2578 at 705-08 (1971).

of Civil Procedure. It is not possible to discern from that order what legal principles were being applied, and the order simply fails to address the key legal issues, such as the legality under Title VII of the use of Dacies' all-white list. Many portions of the opinion relied on by petitioner, such as the conclusion that the challenged practices had no adverse impact on blacks,[91] are so conclusory as to provide no guidance as to the evidence and legal principles on which they were based. In reviewing such district court conclusions as to the ultimate legal issues in a Title VII case, the appellate courts are not bound by the "clearly erroneous" standard.[92]

In view of the origin of the findings signed by the District Judge, the more reliable indication of the Judge's view of the legal issues is the statements made from the bench during the trial itself. Those remarks demonstrate a fundamental misunderstanding of Title VII law. The Judge apparently believed that intentional discrimination could only be established by a confession from Furnco's employees of racial malice. During the testimony of the second witness for plaintiffs, the Judge interjected:

> THE COURT: You have been calling employees of the defendant [the plaintiffs]. Call somebody and ask them if they have a quota system or they are against hiring blacks or that sort of thing, if that is what you want to prove. Tr. 246.

When plaintiffs sought to prove a past policy of discrimination by establishing that all the bricklayers whom Dacies had ever hired before the Interlake job were white, the Judge asserted:

[91] A21.

[92] See, *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944); *East* v. *Romgue, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975); *Flowers* v. *Crouch-Walker, Inc.*, 552 F.2d 1277, 1284 (7th Cir. 1977).

> THE COURT: . . . It doesn't make any difference who they were. The thing involved here is Furnco's policy about hiring bricklayers and not what some other policy was on some other job some years before. Tr. 875.

These remarks were clearly inconsistent with the decisions of this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and *Teamsters* v. *United States*, 431 U.S. 324 (1977). Throughout the trial, despite repeated and unequivocal statements by counsel to the contrary, the District Judge inexplicably maintained a belief that plaintiffs' case was grounded on a legal theory that Furnco had an obligation to hire a quota of incompetent minority bricklayers.[93]

The findings are silent on a number of factual issues which both parties recognize as central to the case—whether Dacies had an all-white list, why Dacies deviated from the practice of other Furnco supervisors of hiring blacks who applied at the gate, whether Furnco or Dacies had engaged in discrimination in the past, and why Dacies

[93] At the beginning of the trial, before plaintiffs' counsel had said a word about his theory of the case, the judge asked

> "THE COURT: Well, do you think there is a quota that should have been followed, or what?
> MR. MINER: No." Tr. 7.

Despite this statement, the judge continued to assert that plaintiffs were urging that Furnco must hire a quota of unskilled minorities. Tr. 244-45, 317-20, 375-76, 561. Moments prior to ruling from the bench, the judge once again voiced this misunderstanding:

> "THE COURT: But I mean, it is your position that an employer must give work to possible incompetent employees just to entend the work among women, Latinos and blacks, is that it?
> MR. MINER: No, my position is that the employer must have a policy that makes it possible for minority people to establish that they are in fact competent to do the work." Tr. 938.

did not call Smith or Samuels although he knew them from past jobs. Consequently, the facts upon which both plaintiffs and the Seventh Circuit relied are not at odds with findings of the trial court, but rather are undisputed facts ignored by the district court. The district court's findings are also inconsistent. For example, the court found that it was essential to Furnco's business that it hire only bricklayers known to Dacies personally,[94] but concluded as well that Furnco and Dacies had a policy of *also* hiring bricklayers who were not known to Dacies but were merely "recommended as being skilled in such work".[95]

In the course of the trial, moreover, the District Judge made a number of erroneous evidentiary decisions. The judge excluded evidence regarding Furnco's and Dacies' past hiring record which would have shown a general pattern of discrimination against blacks,[96] despite this Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-05 (1973), that such evidence is of relevance in a case such as this. The judge excluded as irrelevant evidence offered by plaintiffs regarding hiring practices in the industry,[97] and then based his opinion in part on a finding in favor of the defendant as to the nature of those practices. In assessing the proportion of black bricklayers in the area work force of 1971 the judge accepted 1969 figures offered by defendant, despite the fact that the manner in which they were calculated was never revealed,[98] but excluded 1973 figures offered by plaintiff whose basis was fully explained.[99] The judge also refused without

[94] A15, A20.

[95] A13.

[96] Tr. 244, 322-23, 371, 377-79, 383, 875.

[97] A15, 17, Tr. 59, 244, 322-23, 561, 872-5.

[98] A16.

[99] A16; Tr. 41-44, 619; see also *supra* at 76.

explanation to issue the customary order excluding from the courtroom during the testimony of defense witnesses the remaining defense witnesses who had yet to testify.[100]

The entire trial of this action was punctuated by intemperate and unwarranted remarks by the District Judge. These injudicious statements were directed at the court of appeals,[101] the policies underlying Title VII,[102] plaintiffs,[103] and plaintiffs' counsel.[104] In another Title VII case during

[100] Tr. 43-45, 710-11. See Rule 615, Federal Rules of Evidence.

[101] After inquiring whether Title VII had been construed to bar hiring the most competent employees, the district judge commented, "The Seventh Circuit could do anything, you know". Tr. 12.

[102] In referring to the practice of hiring only those who had previously worked for an employer, which plaintiffs claimed kept most minority bricklayers from working, the following colloquy occurred:

> "Mr. Miner: I think that one of our positions is that this is an absolute obstacle to people who have not been in the industry.
> "The Court: Well, that is too bad".

Tr. 59; see also Tr. 10-11.

[103] When plaintiff Hawkins, while testifying at trial, objected that defendant's counsel was asking him about an interrogatory without letting him read it, the Court remarked,

> "Well, you look like you can understand a four letter question and answer. Mark it for him if he can't understand more than four words at once".

Tr. 475. When plaintiff Williams asked defense counsel to clarify a question, the judge commented. "If you would listen, you would not have to do it again. Do it again. Clean your ears and listen. . . ." *Id.* 413. In response to a defense objection to a question to plaintiff Waters, the judge remarked to defense counsel, "I will let him answer and then I will let you destroy him". *Id.*, 512; see also 555.

Canon 3(A)(3) of the Code of Judicial Conduct provides: "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity. . . ."

[104] Early on the first day of trial the judge stated to plaintiffs' counsel, "I think it is about time that you offer some proof". *Id.* 42. A few minutes later, when counsel asked to make an offer of proof regarding evidence which had been excluded, the judge responded, "Go ahead. Then when you get it all in, then I will know better

the same period the District Judge had acted in similar manner.[105] This injudicious conduct necessarily raised serious doubts as to the reliability and objectivity of the District Judge's findings.

The findings in this case are thus not of the sort to which Rule 52(a) applies. The defects in those findings, together with the actions and evidentiary rulings of the District Judge, are clearly sufficient to require a reversal of the district court's decision. The court of appeals correctly perceived that a remand for further proceedings on the issue of liability would be inappropriate if the uncontested evidence would, as a matter of law, compel a finding in

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how irrelevant it is". *Id.*, 45. When counsel was cross-examining a defense witness, the judge interjected "You have done nothing in an hour and a half. Ten more minutes of doing nothing is going to be the end of your cross examination". *Id.*, 865. Shortly thereafter the judge asked "Have you ever been in court before, counsel"? *Id.*, 870. In an argument concerning the admissibility of certain evidence the court remarked to plaintiffs' counsel, "I mean, if you don't know what the rules of evidence are, I don't know why you are in this courtroom. . . Your father knew the rules of evidence". *Id.* 518-19; see also, *id.*, 367-8, 887.

The District Judge repeatedly objected on behalf of the defendant to plaintiffs' counsel's questions or announced he was sustaining a defense objection when none had been made. Tr. 873, 875, 876.

On the first day of trial the judge remarked "I don't know how much more of this I can take. Fifteen days, my God". Tr. 125. The next day he commented, "If I was running the Chicago office, seeking to do so efficiently with the best help available, and the supernumeracy in the East said they wanted to do it another way, I'd just tell them to go to hell." Tr. 375.

[105] *Denofre* v. *Transportation Inc. Rating Bureau*, 532 F.2d 43, 46 (7th Cir. 1976). Judge Swygert noted with particular disapproval the following remark by the District Judge:

> "These days, everytime a woman or a black or Latino or an elderly person or a young person loses his job, it is a violation these days that their civil rights have been violated, and they flood the federal court not only here but throughout the country and this is a new way of trying to retain your job, regardless of why they are released."

favor of plaintiffs. For the reasons set out *supra,* we believe that such a finding was indeed required on the record in this case. The action of the court of appeals in seeking to avoid a possibly unnecessary remand on the issue of liability was particularly sensible in view of the fact that the District Judge had died while the case was pending on appeal, and that such a remand would thus in all likelihood have required a retrial of the entire case.

V.

The "Questions Presented" In The Petition Are Not Presented By This Case.

Notwithstanding the narrow scope of the questions presented by the petition for writ of certiorari, petitioner has briefed a wide variety of legal and factual issues, some not previously raised in the proceedings below. Our brief has addressed these issues, although they appear in many instances not to be fairly comprised within the scope of the questions presented.

The briefs of both parties amply demonstrate that the Questions Presented as described in the petition are not in fact presented by this case at all. Question 1, whether the court of appeals erred in finding "irrelevant" evidence as to the total number of blacks hired by Furnco, is a simple misreading of the Seventh Circuit's opinion. The court of appeals did not hold that such evidence was irrelevant, but only that it was not conclusive. (A8). Question 2, whether a court may find discrimination due to "disparate treatment" without finding "discriminatory intent", represents, in light of *Teamsters* v. *United States,* little more than a semantic quibble; *Teamsters* treats these phrases as synonymous. 431 U.S. at 335, n.15. The third question, whether discriminatory effect can be found in the absence of dis-

parate impact on minorities, is not in dispute, although the parties are in disagreement as to whether the record in this case demonstrates such disparate impact. The court of appeals, moreover, grounded its decision on the fact that plaintiffs established a *prima facie* case of intentional discrimination under *McDonnell Douglas*, and never reached the issues of discriminatory effect under *Griggs* and its progeny.

Under these circumstances respondents respectfully suggest that the grant of certiorari in this case appears to have been improvident.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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